

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013**

**SESSION LAW 2013-37
SENATE BILL 75**

AN ACT TO AUTHORIZE THE COUNTY OF ONSLOW TO ENTER INTO A
PUBLIC-PRIVATE PARTNERSHIP.

Whereas, Onslow County's current owned and leased human services facilities are severely inadequate because of age, structural and environmental deficiencies, and the volume of citizens required to be served; and

Whereas, Onslow County lacks the resources or ability to construct new facilities that will adequately meet its needs absent an immediate property tax increase; and

Whereas, there are currently no existing, adequate facilities in Onslow County that the County could lease for the purpose of housing its Department of Social Services operations; and

Whereas, federal government funding does not, as currently authorized, provide sufficient funding for Onslow County to construct such a facility with federal funds; and

Whereas, a combination of government funding sources will provide Onslow County sufficient funds to lease an adequate building if such a building were available for lease; and

Whereas, private developers are not willing to construct such a building for lease unless Onslow County commits, in advance, to a long-term lease of such building; and

Whereas, the existing delivery systems set out in G.S. 143-128 are inadequate for Onslow County to obtain a facility sufficient to satisfy its human services needs; and

With the authorization provided by this act, Onslow County intends to enter into a long-term lease with a private developer to secure the space required to satisfy the County's human services needs; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1.(a) Definitions. – For the purpose of this act, the following definitions apply:

(a) "Claimant" includes any individual, firm, partnership, association, or corporation entitled to maintain an action on a bond described in this act and shall include, but not exclusively, any contractor.

(b) "Construction contract" means any contract entered into between a private developer and a contractor for the design, construction, reconstruction, alteration, or repair of any building or other work or improvement, including highways required for a private developer to satisfy its obligations under a development contract.

(c) "Contractor" means any person who has entered into a construction contract with a private developer.

(d) "Development contract" means any contract entered into pursuant to Section 1(b) of this act.

(e) "Labor or materials" shall include all materials furnished or labor performed in the prosecution of the work called for by a construction contract regardless of whether or not the labor or materials enter into or become a component part of the improvement, and further shall include gas, power, light, heat, oil, gasoline, telephone services, and rental of equipment or the reasonable value of the use of equipment directly utilized in the performance of the work called for in a construction contract.

(f) "Private developer" means any person who has entered into a development contract with Onslow County pursuant to this act.

(g) A "public-private project" is defined as a capital project undertaken by Onslow County and a private developer and which is comprised of one or more buildings or other



improvements, including, but not limited to, paving, grading, utilities, infrastructure, reconstruction, or repair and includes both public and private facilities. The public-private project may be located anywhere within the geographic boundaries of Onslow County, including within any municipality in Onslow County.

(h) "Subcontractor" means any person who has contracted to furnish labor or materials to, or who has performed labor for, a contractor or another subcontractor in connection with a development contract.

SECTION 1.(b) Authorization. – If the Board of Commissioners of Onslow County determines that the County will benefit from the County's participation in the development of a public-private project as defined in this act, then the County may acquire, construct, own, lease as lessor or lessee, and operate or participate in the acquisition, construction, ownership, leasing, and operation of a public-private project, or of specific facilities within such a project, including the making of loans and grants from moneys lawfully available therefor. The County's authorization under this section is limited to entering into one public-private project, including, without limitation, social services, public health, and human services functions. The County may enter into binding contracts with one or more municipalities within the County or one or more private-developers, or both, on or before June 30, 2017, with respect to acquiring, constructing, owning, leasing, or operating such a project. The contract shall, among other provisions, specify the following:

- (1) The property interest of the County and all other participants in the development of the project.
- (2) The responsibilities of the County and all other participants in the development of the project.
- (3) The responsibilities of the County and all other participants with respect to financing of the project.

The contract may be entered into before or after the acquisition of any real property necessary to the public-private project and may apply to a public-private project developed on real property owned by the County prior to the Board's determination that the County will benefit from the County's participation in the public-private project.

SECTION 1.(c) Property Acquisition. – A public-private project may be constructed on property acquired by the private developer or private developers, on property acquired by the County, on property acquired by any municipality within the County, or on property acquired by the County, municipality, and private developers.

SECTION 1.(d) Property Disposition. – The County may lease or convey its interest in public-private projects, real or personal property, or other real or personal property owned by it, including air rights over public facilities, through any of the methods authorized in G.S. 153A-176 and G.S. 160A-266, including private negotiation and sale, notwithstanding the limitations of G.S. 160A-266(b) or any other provision of law as to value of the interest conveyed. Notwithstanding the provisions of G.S. 160A-272, property owned by the County may be leased for a period of 10 years or longer without being treated as a sale of the property.

SECTION 1.(e) Construction and Other Contracts. – The contract between the County and the private-developer or private-developers may provide that the private-developer or private-developers shall be responsible for (i) construction of the entire public-private project, (ii) reconstruction and/or repair of the public-private project or any part thereof subsequent to construction of such project, (iii) construction of any addition to the public-private project, (iv) renovation of the public-private project or any part thereof, and/or (v) purchase of apparatus, supplies, materials, or equipment for the public-private project (whether during the initial equipping of such project or subsequent thereto). Additionally, the contract between the County and the private-developer or private-developers may provide that the County and the private-developer or private-developers shall use the same contractor or contractors in constructing a portion of or the entire public-private project. If so, the contract shall include such provisions as the Board of Commissioners of Onslow County deems sufficient to assure that the public facility or facilities included in the public-private project or added thereto are constructed, reconstructed, repaired and/or renovated, and the apparatus, supplies, materials, and equipment purchased for the public facility or facilities included in the public-private project are purchased at a reasonable price. The provisions of Article 8 of Chapter 143 and Article 3 of Chapter 44A of the General Statutes shall not apply to any contracts related to or in furtherance of the public-private project. The County shall require a

private-developer to provide a payment bond for construction work in accordance with the provisions of Section 1(f) of this act.

SECTION 1.(f) Bonding Provisions. – The following bonding provisions apply to this act;

(a) **Bonds Required.** – A payment bond shall be required for any development contract as follows: A payment bond in the amount of one hundred twenty-five percent (125%) of the total anticipated amount of the construction contracts to be entered into between the private developer and the contractors to construct the improvements required by the development contract. The payment bond shall be conditioned upon the prompt payment for all labor or materials for which the private developer or one or more of its contractors or their subcontractors are liable. The payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which the private developer or its contractors or subcontractors are liable. The total anticipated amount of the construction contracts shall be stated in the development contract and certified by the private developer as being a good faith projection of its total costs for constructing the improvements required by the development contract. The payment bond shall be executed by one or more surety companies legally authorized to do business in the State of North Carolina and shall become effective upon the awarding of the development contract. The County, in its discretion, may require a private developer to provide a performance bond.

(b) **Actions on Payment Bonds; Service of Notice.** – Subject to the provision of Section 1(f)(b)(1) of this act, any claimant who has performed labor or furnished materials in the prosecution of the work required by any contract for which a payment bond has been given pursuant to the provisions of this act and who has not been paid in full therefor before the expiration of 90 days after the day on which the claimant performed the last such labor or furnished the last such materials for which he claims payment, may bring an action on such payment bond in his own name, to recover any amount due him for such labor or materials and may prosecute such action to final judgment and have execution on the judgment.

- (1) Any claimant who has a direct contractual relationship with any contractor or any subcontractor but has no contractual relationship, express or implied, with the private developer may bring an action on the payment bond only if he has given written notice of claim on payment bond to the private developer within 120 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished.
- (2) The notice required by Section 1(f)(b)(1) of this act shall be served by certified mail, or by signature confirmation as provided by the United States Postal Service, postage prepaid, in an envelope addressed to such private developer at any place where his office is regularly maintained for the transaction of business or in any manner provided by law for the service of summons.

(c) **Actions on Payment Bonds; Venue and Limitations.** – Every action on a payment bond as provided in this act shall be brought in the General Court of Justice, County of Onslow, North Carolina. No action on a payment bond shall be commenced after one year from the day on which the last of the labor was performed or material was furnished by the claimant.

(c1) **Limitation of Liability of a Surety.** – No surety shall be liable under a payment bond for a total amount greater than the face amount of the payment bond. A judgment against any surety may be reduced or set aside upon motion by the surety and a showing that the total amount of claims paid and judgments previously rendered under such payment bond, together with the amount of the judgment to be reduced or set aside, exceeds the face amount of the bond.

(d) **Variance of Liability; Contents of Bond.** – No act of or agreement between the County, a private developer, or a surety shall reduce the period of time for giving notice under Section 1(f)(b)(1)-(2) of this act, or commencing action under Section 1(f)(c) of this act or otherwise reduce or limit the liability of the private developer or surety as prescribed in this act. Every bond given by a private developer pursuant to this act shall be conclusively presumed to have been given in accordance herewith, whether or not such bond be so drawn as to conform

to this act. This act shall be conclusively presumed to have been written into every bond given pursuant thereto.

(e) **Certified Copy of Bond and Contract.** – Any person entitled to bring an action or any defendant in an action on a payment bond shall have a right to require the County or the private developer to certify and furnish a copy of the payment bond, the development contract, and the construction contract or construction contracts covered by the bond. It shall be the duty of such private developer or the County to give any such person a certified copy of the payment bond and the construction contract upon not less than 10 days' notice and request. The County or private developer may require a reasonable payment for the actual cost of furnishing the certified copy. A copy of any payment bond, the development contract, and the construction contract or construction contracts covered by the bond certified by the County or private developer shall constitute prima facie evidence of the contents, execution, and delivery of such bond, development contract, and construction contracts.

(f) **Form.** – A payment bond form containing the following provisions shall comply with this act: the date the bond is executed; the name of the principal; the name of the surety; Onslow County; the development contract number; and the following conditions:

"KNOW ALL MEN BY THESE PRESENTS, That we, the PRINCIPAL and SURETY above named, are held and firmly bound unto the above named Onslow County, hereinafter called Onslow County, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

"THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into a certain development contract with Onslow County, numbered as shown above and hereto attached;

"NOW THEREFORE, if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the construction work provided for in said development contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

"IN WITNESS WHEREOF, the above bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body."

Appropriate places for execution by the surety and principal shall be provided.

(g) **Attorneys' Fees.** – In any suit brought or defended under the provisions of this act, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purposes of this section, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party defendant or third party defendant against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended. Notwithstanding the foregoing, in the event an offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a "prevailing party" is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer.

(h) **Effect on Other Rights.** – The rights afforded claimants by this act shall be in addition to and not in lieu of any other rights which claimants may have by law or contract, and this act shall not be construed so as to limit such rights.

SECTION 1.(g) Operation. – The County may contract for the operation of any facility or facilities included in a public-private project by any person, firm, or corporation, public or private.

SECTION 1.(h) Financing. – To assist in the financing of its share of a public-private project, the County may apply for, accept, and expend funds from the federal or State government or any other lawful source.

SECTION 1.(i) Additional Requirements. – The County shall determine its programming needs for such human services functions as may be located in the facility to be constructed under this act. The County shall advertise a notice for interested parties to submit

qualifications in such form as the County may require for possible selection as the private developer or private developers in the public-private project in a newspaper having general circulation within the County. Prior to submittal of qualifications, the County shall make available, in such form as it deems appropriate, the programming requirements for the public-private project. Qualifications submitted by interested parties shall include, but not be limited to:

- (1) Evidence of financial stability. Information identified in accordance with G.S. 66-152(3) and G.S. 132-1.2 shall be exempt from disclosure under Chapter 132 of the General Statutes.
- (2) Experience with construction of similar projects.
- (3) Licensure to undertake the actions necessary to accomplish the goals of the public-private project.
- (4) Listing of licensed contractors, licensed subcontractors, and licensed design professionals whom the private developer proposes to use for the project's design and construction team.
- (5) Statement of availability to undertake the public-private project and projected time line for project completion.
- (6) Other information as the County, in its sole discretion, may require.

Based on the qualifications package submitted by a responder, along with any other such information as the County may require, the County may select a private developer or private developers with whom to negotiate the terms and conditions of a contract to perform the public-private project. The County shall advertise the terms of the proposed contract to be entered into by the County in a newspaper having general circulation within the County at least 10 days prior to a regularly scheduled meeting at which the contract is to be considered. The contract for the public-private partnership may only be considered at a regular meeting of the Board of Commissioners of Onslow County.

If the County enters into a contract or lease that involves the actual or effective acquisition of a capital asset, then the contract or lease must provide that no deficiency judgment may be rendered against the County for a breach of a contractual obligation thereunder. The taxing power of the County is not and may not be pledged directly or indirectly to secure any moneys due under a contract or lease that involves the actual or effective acquisition of a capital asset. A contract or lease that involves the actual or effective acquisition of a capital asset shall state that it does not constitute a pledge of the taxing power or faith and credit of the County.

SECTION 1.(j) Other Authority. – The authority granted by this section is in addition to and not in derogation of any other lawful authority granted to the County by law. The County may exercise any authority granted to it by local act or general statute or law in furtherance of a public-private project. By way of illustration, but not of limitation, the County may exercise the following authority in furtherance of a public-private project:

(a) The authority granted in G.S. 153A-176 and Article 12 of Chapter 160A of the General Statutes with respect to the public or private sale, lease, rent, exchange, or other conveyance of property.

(b) The authority of G.S. 153A-13 and G.S. 153A-449 with respect to contracts with, and appropriation of money to, persons, associations, or corporations for the accomplishment of public purposes.

SECTION 2. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 1st day of May, 2013.

s/ Daniel J. Forest
President of the Senate

s/ Thom Tillis
Speaker of the House of Representatives